



# **STATE MINING AND GEOLOGY BOARD**

## **EXECUTIVE OFFICER'S REPORT**

**For Meeting Date: June 10, 2010**

**Agenda Item No. 3: Approval Consideration for Exemption from the Requirements of the Surface Mining and Reclamation Act (SMARA, Public Resources Code Section 2710 et seq.) Pursuant to Section 2714(f) for the Tea Pot Dome Water District Groundwater Recharge Basin, County of Tulare.**

**INTRODUCTION:** The Surface Mining and Reclamation Act of 1975 (SMARA) allows for a one- time exemption for certain surface mining operations should the State Mining and Geology Board (SMGB) determine the operation to be of an infrequent nature and involve only minor surface disturbances. EnvironMINE, Inc., on behalf of the Tea Pot Dome Water District, has submitted a request for a one-time exemption from SMARA for the excavation of 84,000 cubic yards of material to be exported from the site, as part of construction of a groundwater recharge banking reservoir located approximately three miles southwest of the town of Porterville, County of Tulare. The SMGB has the statutory authority to consider and grant such an exemption under certain conditions.

**STATUTORY CONSIDERATIONS:** Public Resources Code (PRC) Section 2735 defines surface mining operations and states:

*“Surface mining operations” means all, or any part of, the process involved in the mining of minerals on mined lands by removing overburden and mining directly from the mineral deposits, open-pit mining of minerals naturally exposed, mining by the auger method, dredging and quarrying, or surface work incident to an underground mine. Surface mining operations shall include, but are not limited to:*

- (a) Inplace distillation or retorting or leaching.*
- (b) The production and disposal of mining waste.*
- (c) Prospecting and exploratory activities.”*

SMARA allows for a one-time exemption pursuant to Article 1 of Public Resources Code (PRC), Division 2, Chapter 9, Section 2714(f), which states:

*“Any other surface mining operations that the board, as defined by Section 2001, determines to be of an infrequent nature and which involve only minor surface disturbances.”*



*Executive Officer's Report*

Before exemptions from the provisions of SMARA are granted, the SMGB, pursuant to SMARA and SMGB Resolution No. 93-6, considers the following four criteria:

**Criteria 1 - Compliance with the California Environmental Quality Act**

**(CEQA):** Pursuant to PRC Section 2712(a), has an environmental review been completed for the proposed activity either separately or as part of a larger project? PRC Section 2712(a) states “*It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that: (a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.*”

**Criteria 2 - Local authority:** Pursuant to PRC Sections 2715 and 2770(a), is the proposed activity permitted or otherwise authorized by a local lead agency? PRC Section 2715 states “*No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on any of the following:*

(a) *On the police power of any city or county or on the power of any city or county to declare, prohibit, and abate nuisances.*

(b) *On the power of the Attorney General, at the request of the board, or upon his own motion, to bring an action in the name of the people of the State of California to enjoin any pollution or nuisance.*

(c) *On the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized or required to enforce or administer.*

(d) *On the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in Part 3 (commencing with Section 3479) of Division 4 of the Civil Code or for any other private relief.*

(e) *On the power of any lead agency to adopt policies, standards, or regulations imposing additional requirements on any person if the requirements do not prevent the person from complying with the provisions of this chapter.*

(f) *On the power of any city or county to regulate the use of buildings, structures, and land as between industry, business, residents, open space (including agriculture, recreation, the enjoyment of scenic beauty, and the use of natural resources), and other purposes.”*

PRC Section 2770(a) states “*Except as provided in this section, no person shall conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by, the lead agency for the operation pursuant to this article.*”



**Criteria 3 - End use of the mining or borrow site:** Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of property on which the activity is proposed to occur defined? PRC Section 2711(b) states *“The Legislature further finds that the reclamation of mined lands as provided in this chapter will permit the continued mining of minerals and will provide for the protection and subsequent beneficial use of the mined and reclaimed land.”*

PRC Section 2712 states *“It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that:*

*(a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.*

*(b) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.*

*(c) Residual hazards to the public health and safety are eliminated.”*

**Criteria 4 - Impacts of the operation on commercial activities:** Pursuant to PRC Section 2714(b), have the potential impacts on commercial interests resulting from the proposed activity been considered? PRC Section 2714(b) states *“Onsite excavation and onsite earthmoving activities that are an integral and necessary part of a construction project that are undertaken to prepare a site for construction of structures, landscaping, or other land improvements, including the related excavation, grading, compaction, or the creation of fills, road cuts, and embankments, whether or not surplus materials are exported from the site, subject to all of the following conditions:*

*(1) All required permits for the construction, landscaping, or related land improvements have been approved by a public agency in accordance with applicable provisions of state law and locally adopted plans and ordinances, including, but not limited to, Division 13 (commencing with Section 21000).*

*(2) The lead agency’s approval of the construction project included consideration of the onsite excavation and onsite earthmoving activities pursuant to Division 13 (commencing with Section 21000).*

*(3) The approved construction project is consistent with the general plan or zoning of the site.*

*(4) Surplus materials shall not be exported from the site unless and until actual construction work has commenced and shall cease if it is determined that construction activities have terminated, have been indefinitely suspended, or are no longer being actively pursued.”*



**BACKGROUND:** In correspondence dated April 28, 2010, EnvironMINE, Inc., on behalf of the Tea Pot Dome Water District, has submitted a request for a one-time exemption from SMARA for the excavation of 84,000 cubic yards of material to be exported from the site, as part of construction of a groundwater recharge banking reservoir. The exported material is to be used to cap a nearby landfill. The subject site is located approximately three miles southwest of the town of Porterville, County of Tulare.

The project is being proposed by the Tea Pot Dome Water District, *“a ‘local agency’ with independent authority to approve and carryout construction of facilities for the production, generation, storage, or transmission of water...”* The project includes construction of a 9 acre recharge reservoir and a turnout from the Friant-Kern Canal for banking of water from the Central Valley Project, and other waters of the District, in the groundwater basin for later extraction.

**DISCUSSION:** It is the Executive Officer’s understanding that this is a one-time exemption request. Although the applicant states in their April 28, 2010 correspondence that, in their view, the project is exempt from SMARA pursuant to PRC Section 2714(b), such view is not consistent with long standing state policy. The construction exemption applies to excavated material that is incident to a construction project. The proposed excavation is not exempt under PRC Section 2714(b) because:

1. The earth moving activities are not an integral and necessary part of a construction project;
2. The earth moving activities are not being undertaken to prepare the site for construction of structures, landscaping, or other land improvements associated with structures;
3. The construction project in this case is capping of a nearby landfill. The earth moving activities are occurring approximately one-half mile away from the landfill, not “on site;” and
4. As presented, the earthmoving activities constitute an offsite borrow pit to provide cover material for a nearby landfill. Borrow pits are defined in California Code of Regulations (CCR) Section 3501 as *“Excavations created by the surface mining of rock, unconsolidated geologic deposits or soil to provide material (borrow) for fill elsewhere.”*



Discussions with the Office of Mine Reclamation (OMR), indicate:

- An end use as a groundwater recharge basin is not uncommon, and is consistent with the intent of SMARA that mining operations with this eventual beneficial end use be reclaimed. Similar projects have been required to comply with SMARA and obtain an approved reclamation plan;
- As the availability of water supplies becomes more critical, OMR expects to see more mining operations with an end use of water storage and groundwater recharge; and
- Tulare County officials have indicated that several similar projects will be forthcoming.

General threshold criteria triggering SMARA is discussed in PRC Section 2714(d), which indicates that SMARA does not apply to operations where “*Prospecting for, or the extraction of, minerals for commercial purposes where the removal of overburden or mineral product total less than 1,000 cubic yards in any one location, and the total surface area disturbed is less than one acre.*” In this case the removal of 84,000 cubic yards of material from the 9-acre borrow pit it is subject to SMARA, unless exempted by the SMGB pursuant to SMARA Section 2714(f).

It is recognized that not all surface mining operations are an efficient “fit” under SMARA, and that many projects of limited size, duration, economic and environmental impact would be prevented, delayed, or rendered uneconomic if the requirements of SMARA were fully applied. To address these special situations, SMARA provides the SMGB with authority under PRC Section 2714(f) to grant exemptions under specific conditions when the proposed activity is of an infrequent nature and involves only minor surface disturbance.

The proposed project 1) exceeds SMARA's minimum thresholds by disturbing more than one acre of land and 1,000 cubic yards of material for commercial purposes. However, one-time exemptions have been granted by the SMGB in the past in instances where such thresholds have been significantly exceeded, but not typically when materials being extracted for export and commercial gain.

**Exemption Criteria:** The SMGB must contemplate four specific criteria, as discussed above, in considering granting a one-time exemption:



**Criteria No. 1:** Pursuant to PRC Section 2712(a), has an environmental review been completed on the proposed activity either separately or as part of a larger project?

**Finding No. 1:** A Notice of Determination in compliance with PRC Section 21152 was filed on June 3, 1999. A copy of the environmental review was not provided, however, it is stated in the applicant's April 28, 2010, correspondence that the project will not have a significant effect on the environment, a Negative Declaration was prepared and filed, and mitigation measures were not made a condition for approval of this project, and a statement of Overriding Considerations was not adopted for this project.

**Criteria No. 2:** Pursuant to PRC Sections 2715 and 2770(a), is the proposed activity permitted or otherwise authorized by a local lead agency?

**Finding No. 2:** The Tulare County Resource Management Agency on November 5, 2009, issued a grading permit (#A0902508) for this project. A San Joaquin Valley Air Pollution Control permit also approved the dust control plan for this project on December 3, 2009.

**Criteria No. 3:** Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of property on which the proposed activity is to occur defined?

**Finding No. 3:** The end use or proposed end use of the property on which the activity will occur will be a recharge basin. Although it is stated in the applicant's April 28, 2010, correspondence, that the proposed activity is "*of low-impact and will occur one-time only (i.e., it is of an infrequent nature)...*", similar projects statewide have been required to comply with SMARA. Furthermore, should this project be exempt, the SMGB can anticipate a number of this types of exemption request in the future reflecting the water needs in certain parts of the state.

**Criteria No. 4:** Pursuant to PRC Sections 2714(b), have the potential impacts on commercial interests resulting from the proposed activity been considered?

**Finding No. 4:** The excavated material is planned to be stockpiled on an adjacent property under agreement and owned by the Bureau of Reclamation, and may be used by the Tulare County Landfill as final cover material should the material fulfills the requirements set forth for the landfill. Regardless, whether the extracted material is to be sold creating an unfair level playing field is uncertain.





**CONSIDERATIONS BEFORE THE SMGB:** The Executive Officer can deny a one-time exemption request if, upon review, the request does not meet the criteria set forth in SMGB Resolution No. 93-6. However, such a matter can also be placed before the SMGB if 1) a request is made by one SMGB member; 2) the Executive Officer cannot come to a clear consensus; or 3) if controversy arises surrounding the request.

In cases when a request comes before the SMGB, the SMGB can grant a one-time exemption on a case-by-case basis. Prior to granting such exemptions, the SMGB considers, and must assure, that the following criteria have been fully addressed:

- 1) Compliance with the California Environmental Quality Act (CEQA);
- 2) Local authority;
- 3) End use of the mining or borrow site; and
- 4) Impacts of the operation on commercial activities.

**EXECUTIVE OFFICER'S RECOMMENDATION:** The proposed activity is subject to SMARA and does not meet the construction exemption as set forth in PRC Section 2714(b). It is the Executive Officer's conclusion that the project ~~does~~ not meet the statutory requirement that the project be of an infrequent nature, and that a one-time exemption request does not meet the SMGB's criteria for consideration of such exemptions pursuant to PRC Section 2714(f). ~~Based~~ Based on the information before SMGB staff, and analysis and findings set forth above, it is the Executive Officer's recommendation that the SMGB not grant the request for a one-time exemption for this proposed project.

**SUGGESTED SMGB MOTION:**

To deny the request for a one-time exemption:

*Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that the project as proposed by the Tea Pot Dome Water District, and as described in this report and its attachments, is subject to the requirements of SMARA, and that the SMGB deny a one-time exemption from SMARA for this project under its authority provided by Public Resources Code Section 2714(f).*



OR





To grant the request for a one-time exemption:

*Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that the project as proposed by the Tea Pot Dome Water District, and as described in this report and its attachments, is subject to the requirements of SMARA, but that the SMGB conditionally grant a one-time exemption from SMARA for this project under its authority provided by Public Resources Code Section 2714(f).*

Respectfully submitted:

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Stephen M. Testa  
Executive Officer



## EXHIBITS

**Exhibit A**                      **Documents submitted by EnvironMine dated April 28, 2010.**

